INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
A. The merging companies	3
B. Consolidated's post-acquisition attempts to induce reciprocal buying	5
C. The decision of the Federal Trade Commission	7
D. The decision of the court of appeals	10
Summary of Argument	11
Argument	14
I. Section 7 bars any corporate merger which so changes the structure of the market as to make substantial reciprocal buying probable	15
A. Overt reciprocal buying arrangements are unlawful because they are inherently anticompetitive	15
B. Reciprocal buying is equally anticompetitive when it results from tacit accommodation rather than express arrangement	20
C. The most effective means of preventing accommodative reciprocal buying is by restraining mergers which change the market structure and make such buying probable	23

760-298—65——1

Argument—Continued Page

II. The Commission correctly found that the Consolidated-Gentry merger violated Section 7 30

A. The changed market structure caused by the merger is likely to produce reciprocal buying and market foreclosure 31

1. The post-merger market structure is conducive to reciprocal buying ... 31

2. Reciprocal buying is a useful weapon to increase sales in the industry 35

3. Consolidated had success in some overt efforts to capitalize on its advantageous post-merger position 40

4. The record provides no reason to believe that Consolidated lacked the power to foreclose competition 43

B. The post-acquisition evidence failed to establish that reciprocal buying could not be achieved in the food industry 46

Conclusion 53

Appendix A 54

Appendix B 55

Appendix C 56

Appendix D 57

CITATIONS

Cases:

	Page
Brown Shoe Co. v. *United States*, 370 U.S. 294	25
California Packing Co., 25 F.T.C. 379	16
Ekco Products Co., No. 8122, Apr. 21, 1964	48
International Salt Co. v. *United States*, 332 U.S. 392	17, 39
Mechanical Manufacturing Co., 16 F.T.C. 67	16
Northern Pac. R. Co. v. *United States*, 356 U.S. 1	17, 40
Procter & Gamble Co., No. 6901, Nov. 26, 1963	48
Standard Oil Co. v. *United States*, 337 U.S. 293	22, 50
United States v. *Continental Can Co.*, 378 U.S. 441	25, 27, 48
United States v. *Ingersoll-Rand Co.*, 320 F. 2d 509	27
United States v. *Philadelphia National Bank*, 374 U.S. 311	47
Waugh Equipment Co., 15 F.T.C. 232	16

Statutes:

Clayton Act, Section 7, 38 Stat. 731, as amended, 15 U.S.C. 18	2, 12, 13, 14, 15, 25, 30, 46, 47, 48
Federal Trade Commission Act, Sec. 5, 15 U.S.C. 45	15, 23, 24, 40
Sherman Act, 15 U.S.C. 1, Sec. 1	15, 24

Miscellaneous:

Ammer, *Realistic Reciprocity*, 40 Harv. Bus. Rev. (Jan.–Feb. 1962) 116	17, 18, 19, 20, 26
Donnem, *Conglomerate Mergers and Reciprocity*, 8 Antitrust Bull. 283	19
Edwards, *Conglomerate Bigness as a Source of Power*, Nat'l Bureau of Economic Research, *Business Concentration and Price Policy* (1955)	18, 26

Miscellaneous—Continued

Page

Handler, *Emerging Antitrust Issues: Reciprocity, Diversification and Joint Ventures*, 49 Va. L. Rev. 433 ..... 19, 20

Hausman, *Reciprocal Dealing and the Antitrust Laws*, 77 Harv. L. Rev. 873 ..... 19, 20, 24, 35

Mandell, *Reciprocity: Industry's Secret Sales Weapon*, Dun's Review & Modern Industry (Sept. 1960) 20

Stocking and Mueller, *Business Reciprocity and the Size of Firms*, 30 J. Bus. U. Chi. 73 ..... 18, 19, 20

Wall Street Journal, Dec. 4, 1963 19

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 422

FEDERAL TRADE COMMISSION, PETITIONER

v.

CONSOLIDATED FOODS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 2689–2693)[1] is reported at 329 F. 2d 623. The opinion of the Federal Trade Commission (R. 52–78) is not yet officially reported. The initial decision of the hearing examiner is reproduced at R. 30–49.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1964 (R. 2694). By orders entered on

[1] "R." refers to the printed record; Consolidated's (respondent's) exhibits are cited as "RX"; and Commission exhibits are cited as "CX". The entire record is printed except for a few statistical exhibits which are cited as follows, *e.g.*, "RX 411, unprinted." The places in the record where the exhibits we rely upon were received into evidence are listed in Appendix D. pp. 57–59, *infra*.

June 20 and July 21, 1964, Justices Clark and Stewart extended the time for filing a petition for a writ of certiorari to and including August 21, 1964 (R. 2694–2695). The petition was filed on the latter date and granted on November 16, 1964 (R. 2695). The jurisdiction of this Court is conferred by 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether Section 7 of the Clayton Act was violated by a large wholesale and retail grocery company's acquisition of a firm producing dehydrated onion and garlic used by food processors which supply the grocery company, on the ground that such a merger renders it probable that reciprocal buying will foreclose a substantial part of the market to competitors of the acquired company.[2]

STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the

[2] There is no dispute over threshold issues. It was agreed that the relevant "section of the country" was the whole United States, and that dehydrated onion and dehydrated garlic constituted the appropriate "lines of commerce" (R. 67 n. 5). The parties and the court of appeals, in appraising the effects of the merger, treated dehydrated onion and garlic as a single line of commerce rather than as separate lines (see Petitioner's Brief in the court of appeals, p. 4), and we continue to do so in this Court.

whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

The Federal Trade Commission held that the acquisition in 1951 by Consolidated Foods Corporation ("Consolidated") of Gentry, Inc. ("Gentry") violated Section 7 of the Clayton Act because it gave rise to a "real and substantial" danger that through "reciprocal buying" Gentry's competitors would be foreclosed from a substantial share of the market for the products—dehydrated onion and garlic—sold by it. The Court of Appeals for the Seventh Circuit reversed, holding that the failure of Gentry to increase its share of the market in the years following the merger, despite Consolidated's attempts to induce reciprocal buying, demonstrated that the merger has had no substantial anticompetitive effect.

A. THE MERGING COMPANIES

Consolidated is a large, diversified food company which owns several food processing plants and a nationwide network of wholesale and retail food stores (R. 53). In 1956 it had net sales of more than $268 million and assets of $99 million—which were then about 50 percent greater than in 1951 (R. 53).[3] Consolidated is a substantial purchaser of the

[3] A good portion of Consolidated's growth is attributable to its acquisitions, 21 of which (including Gentry) took place between 1951 and 1958 (RX 395A–B, R. 2662–2663).

products of food processors, having bought about $134 million worth in 1955 (CX 1, R. 1974). Those processors, in turn, purchase dehydrated onion and garlic for use in preparing and packaging their foods (R. 56).

Gentry is a firm principally engaged in the manufacture of dehydrated onion and garlic, with assets at the time of acquisition of $1.6 million (R. 53–54). In 1950, immediately prior to its acquisition by respondent, Gentry accounted for about 32 percent of the total sales of the dehydrated garlic and onion industry, and together with its principal competitor, Basic Vegetable Products, Inc. ("Basic"), accounted for slightly less than 90 percent of total industry sales. The remaining 10 percent was divided between two other firms. By 1958 the total industry output of both products had more than doubled; Gentry's share had risen slightly to 35 percent; and the combined share of Gentry and Basic remained around 90 percent.[4]

[4] The combined figures in the text for the line of commerce comprising both onion and garlic (note 2, *supra*) are derived from the following data given at R. 54, which show Basic's and Gentry's percentage shares of sales of onion and garlic for 1950 and 1958:

	1950		1958	
	Onion	Garlic	Onion	Garlic
Gentry	28	51	35	39
Basic	60	36	57	50
Total	88	87	92	89

At the time of the acquisition the onion and garlic industry contained four firms: Gentry, Basic, and the relatively tiny

B. CONSOLIDATED'S POST-ACQUISITION ATTEMPTS TO INDUCE RECIPROCAL BUYING

The merger was consummated on April 30, 1951 (R. 33). Soon thereafter Gentry's employees attempted to enlist Consolidated's aid in selling to food processors (see, *e.g.*, CX 7A–B, 10, 11A–B, 20A, R. 1993, 1998–2001, 2015). As Gentry's vice-president in charge of sales (Joseph Farrell) testified, the company's general practice was to request Consolidated's help in dealing with potential customers (R. 242–243). Consolidated's officials cooperated. In September 1951, for example, after a request from Farrell for Consolidated's assistance in selling to 15 named companies,[5] Lloyd Bellisime, then a Gentry vice-president, wrote to the head of Gentry's Chicago office (CX 6, R. 1991):

> Mr. Kennedy himself [the president of Consolidated] is very enthused over the possibility of helping to increase our distribution in every way possible, and I know he will do everything

---

Puccinelli Packing Company and J. R. Simplot Company (R. 34, 35, 54). The latter concern left the industry in 1956. In 1959 Gilroy Foods, Inc., entered the market and, in 1961, it was purchased by McCormick Foods, Inc., whose requirements exceed Gilroy's total output (R. 34, 73 n. 9). California Vegetable Concentrates, Inc., a subsidiary of General Foods Corporation, was scheduled to complete a dehydrated onion processing plant by late 1961 (R. 2690).

[5] Farrell's letter stated (CX 7A–B, R. 1993): "If a letter were sent by the Chairman or President of Consolidated Grocers to the President of each of these companies, letting them understand that Gentry is a division of Consolidated Grocers and whatever business they could give Gentry would be appreciated, would help us considerably."

within his power to see that some of these tough nuts are cracked.

He is such a very busy person and has so many things to do, we almost hate to presume further on his time, yet nevertheless that is the way he wants it, so by all means discuss this matter with him.

The companies mentioned in the letters were discussed with Kennedy in October 1951. Kennedy suggested that as to those firms which did business with Consolidated, "this is a factor which should be stressed in calling upon buyers" (CX 8A–B, R. 1996). He also said that he and other people from Consolidated would make contact with the prospective buyers "in endeavoring to assist [Gentry] in selling" to them (R. 1995).

In May 1953, Consolidated's secretary, Stacey Gifford wrote the following in a form letter to all of Consolidated's distributing divisions (CX 14B, R. 2006–2007; see R. 1719):

Oftentimes, it is a great advantage to know when you are calling on a prospect, whether or not that prospect is a supplier of someone within your own organization. Everyone believes in reciprocity providing all things are equal.

Attached is a list of prospects for our Gentry products. We would like to have you indicate on the list whether or not you are purchasing any of your supplies from them. If so, indicate whether your purchases are relatively large, small or insignificant. * * *

* * * * *

> Will you please refer the list to the proper party in your organization. * * * If you have any special suggestions, as to how you could be helpful in properly presenting Gentry to any of those listed, it will be appreciated.
>
> Please return the noted lists to the writer.[8]

Some of the reciprocity discussions between Consolidated and Gentry, on the one hand, and Consolidated's suppliers, on the other, are detailed in Commission exhibits 6 through 95 (R. 1990–2108), and several of the instances relevant to the issues presented by this case are summarized in our Argument (pp. 35–43, *infra*). They show that Consolidated attempted to coerce or induce reciprocal buying by its suppliers who were potential customers of Gentry, that overt attempts were occasionally successful, and that other suppliers were prepared to buy from Gentry as long as its price and quality were equal.

C. THE DECISION OF THE FEDERAL TRADE COMMISSION

The Commission held that Consolidated's acquisition of Gentry violated Section 7 because it gave respond-

[8] The letter also assured the distributors that "pressure tactics will not be used" and that "the utmost tact will be used by the Gentry organization" (R. 2007). A similar concern with tactfulness in reciprocity approaches was indicated in 1955. Bellisime of Gentry then suggested that Consolidated require its suppliers to use raw materials (such as dehydrated onion and garlic) produced by it by making "inclusion of [its] raw material in the finished product from the [supplier] * * * a purchasing specification" (CX 226A–F, R. 2307–2308). The proposal was rejected because, among other reasons, while Consolidated did not see "anything to fear in discussing or asking for reciprocity from suppliers * * *," it did not want to bind itself to purchase from Gentry's customers (RX 151A–B, R. 2460–2462).

ent a new and anticompetitive advantage—the mixed threat and lure of reciprocal buying—which was not available to its competitors and would tend to foreclose them from a substantial market, and which promised further to rigidify an already concentrated industry and to discourage new entrants.

Reciprocal buying, in the words of the Commission, "involves nothing more than the simple idea that 'I will buy from you if you will buy from me,' or the unspoken 'If I buy from him, he will buy from me'" (R. 56). The Commission pointed out that business reciprocity is necessarily anticompetitive (R. 62):

> It distorts the focus of the trader by interposing between him and the traditional competitive factors of price, quality, and service an irrelevant and alien factor which is destructive of fair and free competition on the basis of merit. * * * In this situation, it is the relative size and conglomeration of business rivals, rather than economic efficiency, that may determine firm growth and success, and, ultimately, the allocation of resources. * * *

The Commission concluded that the merger presented Consolidated with an opportunity to make sales in one product market "on the sheer strength of its buying power in other markets" and thus posed a "real and substantial" threat to competition (R. 66, 71). Since Consolidated, as a result of its acquisition of Gentry, is a seller of dehydrated onion and garlic, and, at the same time, a purchaser from food processors who are buyers of dehydrated onion and garlic, processors desiring to retain or obtain Consolidated's patronage are, the Commission found, likely to

give preference to Consolidated as a source of supply for those ingredients (R. 66–67). In this connection, the Commission found that a minimum of 25 percent of the onion and garlic market could be affected by the acquisition since, in 1958, producers that both supplied Consolidated and bought in volume from Gentry purchased, at the very least, one-fourth of the entire industry's output of onion and garlic; that "many other prospective purchasers from Gentry could be influenced * * * by Consolidated" (R. 69–70); that, although Consolidated had "not chosen to systematize and vigorously enforce its reciprocal buying policy," it had actually used its reciprocity power on occasion to damage competitors unfairly (R. 70); and that the record did not show any "solid and effective external limitations" or "industry conditions" which would preclude Consolidated from effectively implementing a policy of reciprocal dealing on a much larger scale in the future (R. 70–71).

In reaching a judgment that the merger was likely to lessen competition substantially, the Commission emphasized the structure of the dehydrated onion and garlic market. It observed that "Section 7 is designed * * * to 'nip in the bud' such changes in the structure of an industry, produced by corporate acquisitions, as are likely to bring about substantial lessening of competition" (R. 55). The Commission held, therefore, that its inquiry should "not focus on overt anticompetitive trade practices as such, but rather on changes in market or industry structure that are effected by the challenged merger * * *" (R. 55). Such a focus was particularly appropriate

here, the Commission ruled, because only divestiture could "remove the attraction, implicit in the Consolidated-Gentry relationship, which is now well-known in the industry, for suppliers or prospective suppliers of Consolidated to purchase from Gentry solely or principally in the hope of maintaining or enhancing their sales position with Consolidated" (R. 76).

Regarding the onion and garlic industry structure, the Commission noted that "[w]ith two firms accounting for better than 85% of both product lines for eleven successive years, maximum concentration short of monopoly has already been achieved" (R. 72). The acquisition and its creation of opportunities for reciprocal buying, the Commission held, "strengthened and solidified" this two-firm oligopoly, discouraged new entries, and constituted an obstacle "to the creation of genuinely competitive conditions" (R. 72–73). In conclusion, the Commission noted that the merger threatened anticompetitive results "without producing any countervailing competitive, economic, or social advantages" (R. 75).

D. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals for the Seventh Circuit reversed. It ruled that the Commission had failed to show a probability that the merger would substantially lessen competition, reasoning that (R. 2692)—

> here ten years of post-acquisition experience—during which Consolidated attempted overt enforcement of reciprocal buying practice where it deemed it might be successful—serves to

demonstrate that neither the acquisition of Gentry, in and of itself, nor the overt attempts to use buying power to influence sellers to Consolidated to purchase from Gentry resulted in substantial anticompetitive effect. No substantial impact on the relevant market occurred, and absent some factor which requires a different approach we are of the view that the experience reflected by this post-acquisition period must weigh heavily in appraising future probabilities.

SUMMARY OF ARGUMENT

I

Whenever two companies which are potential customers of one another enter into an agreement to make reciprocal purchases, the competitors of each are obviously disadvantaged. The inducement which causes each to enter into the agreement and to make the prescribed purchases has no relation to the quality or price of the products; it turns rather on the benefit which the purchaser obtains by assurance of the equivalent purchase of his product. Similarly, if a seller with substantial buying power coerces suppliers who are also potential customers to buy from him, he is using his purchasing power as "leverage" with which to obtain a sale of his own product. Competitors who do not have this coercive power because they are not their own suppliers' customers cannot obtain sales in the same way and cannot negotiate such agreements; they are denied an equal opportunity to compete and are thus unfairly foreclosed from the market.

Similar in anticompetitive effect to overt reciprocity arrangements or coercive tactics are tacit or accommodative reciprocal buying practices. Whenever the market structure renders it seemingly profitable for a buyer to purchase from *A* rather than *B* simply because *A* is a potential customer, *B* is being unfairly hampered in his effort to obtain the buyer's patronage. Even if he produces a superior product or provides a better price—factors which, in a free competitive market, should entitle him to the patronage—he may be deprived of the buyer's business merely because of the pressures of reciprocity.

The only effective remedy against reciprocal buying of this sort is provided by Section 7 of the Clayton Act. When a merger so alters the structure of a market as to create or increase significantly the inducement to engage in substantial reciprocal buying, the merger has the probable effect of substantially lessening competition; the structural relief authorized by Section 7 should then be used to preserve the free competitive environment existitng before the merger. Relief under Section 7 is particularly appropriate because reciprocal buying is a contemporary product of the very trend towards business conglomeration which prompted the enactment of that statute.

II

The Commission's finding that the merger had the proscribed effect on competition is fully supported by the evidence in the record. By acquiring Gentry,

Consolidated became a supplier or potential supplier of ingredients to food processors—most of whom were, in turn, suppliers of Consolidated. Since Consolidated's suppliers were already purchasing from Gentry approximately 25 percent of the total domestic dehydrated onion and garlic supply, the merger had an immediate effect on that share of the market. In addition, Consolidated's buying "leverage" could affect not only those Consolidated suppliers who had previously purchased from Gentry's competitors but also any potential suppliers of Consolidated.

The Commission's conclusion regarding the anticompetitive effect of the merger was also supported by its analysis of the market structure, which showed that none of Gentry's competitors was in a position to exert similar reciprocity pressures, and that the dehydrated onion and garlic industry was highly concentrated and oligopolistic, so that new entrants were discouraged even before the merger. Finally, the testimony and other evidence demonstrated that industry executives believed that reciprocity was a useful and practicable tool in obtaining business in the dehydrated onion and garlic market and in the food industry in general.

The Commission properly relegated post-acquisition evidence to a secondary role because such evidence is ordinarily of questionable reliability and because heavy reliance on it is inconsistent with the prophylactic purpose of Section 7. In any event, the post-acquisition evidence falls completely short of demon-

760-298—65——3

strating that reciprocity could not work in the food industry; it shows that notwithstanding their inferior quality, Gentry products generally maintained their share of the market in the years following the merger and, in fact, their sales were heavily concentrated among Consolidated's suppliers.

ARGUMENT

The Federal Trade Commission concluded that the Consolidated-Gentry merger violated Section 7 of the Clayton Act because it created a substantial threat that Consolidated would foreclose Gentry's competitors from a significant share of the market for dehydrated onion and garlic by expressed or implied purchasing reciprocity. To demonstrate the soundness of this conclusion, we show (1) that express reciprocal buying arrangements, like tying agreements, are unlawful because they are inherently anticompetitive; (2) that implied or tacit reciprocity agreements suffer from the same vice; (3) that whereas express reciprocity arrangements may be dealt with by other statutory remedies, tacit reciprocal buying can be effectively prevented only by preserving the competitive structure of an industry against mergers which create a substantial probability of reciprocal buying; (4) that the Commission properly found, on this record, that the change in market structure produced by the Consolidated-Gentry merger created such a probability; and (5) that the post-merger evidence introduced in rebuttal by respondent did not prove otherwise.

I

SECTION 7 BARS ANY CORPORATE MERGER WHICH SO CHANGES THE STRUCTURE OF THE MARKET AS TO MAKE SUBSTANTIAL RECIPROCAL BUYING PROBABLE

A. OVERT RECIPROCAL BUYING ARRANGEMENTS ARE UNLAWFUL BECAUSE THEY ARE INHERENTLY ANTICOMPETITIVE

One form of reciprocal buying occurs when Company *A*, which sells a product used by Company *B* and which also buys products of the sort produced by Company *B*, arranges explicitly to buy Company *B*'s product if Company *B* buys from Company *A*. The offer takes the form of "I will buy from you if you will buy from me," and it may, of course, be initiated by either company.

The Commissioner's decision in the present case proceeded on the premise—apparently undisputed by respondent (Br. in Opp. 10, 43–44)—that reciprocal buying arrangements are inherently anticompetitive, and that if they are used as a means of coercing purchases or if they are formalized, they may be reached and prohibited under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as an unfair method of competition, or possibly under Section 1 of the Sherman Act, 15 U.S.C. 1, as an unreasonable restraint of trade. In other words, on the facts of this case, it would be clearly unlawful for Consolidated, which owns a national network of wholesale and retail food stores, to wield its buying power as a club with which to coerce purchasers of dehydrated onion and garlic to buy Gentry products. Consolidated may not threaten to withdraw its orders if Gentry products cease being bought by its suppliers nor may it ex-

pressly condition future purchases on the receipt of orders for Gentry products.

The reasons for this prohibition—applied in three Federal Trade Commission decisions[7] and never questioned—are apparent. The principal vice of any course of conduct involving such an agreement, promise, or threat is that it inhibits free competition by introducing into the market-place what the Commission has characterized as "an irrelevant and alien factor which is destructive of fair and free competition on the basis of merit" (R. 62). Rather than choosing among products solely on the basis of legitimate competitive considerations such as each producer's price, quality, and service, a customer to whom such a threat or promise is made must weigh the consequences which his choice will have on a single producer's willingness in turn to buy his product. If, for example, Company *A* puts such a proposition to Company *B*, which is, at the same time, *A*'s potential customer and supplier, *B*'s decision whether or not to buy *A*'s product will depend not only on the quality of that product and its price, but on the benefit to be derived from making sales to *A*. Companies *C* and *D*, which compete with *A* for *B*'s custom, but which are not potential purchasers of *B*'s product, will be unable to provide a similar inducement for purchases of their product.[8] Under

[7] *Waugh Equipment Co.*, 15 F.T.C. 232; *Mechanical Manufacturing Co.*, 16 F.T.C. 67; *California Packing Co.*, 25 F.T.C. 379.

[8] Similarly, Companies *E* and *F*, which compete with *B* for *A*'s patronage, will be unable to sell their products to *A* unless they are also potential customers of *A* and can enter into similar reciprocal buying arrangements.

these circumstances, *A*'s product, which may be inferior in quality, price, or service, may be selected by *B* simply because the importance of winning or retaining *A* as purchaser is great enough to overcome the shortcomings of the product. The consequence is that "business [is divided] on some basis other than product or company superiority" (Ammer, *Realistic Reciprocity,* 40 Harv. Bus. Rev. (Jan.–Feb. 1962), p. 124)—a result clearly inconsistent with free and fair competition.

What Company *A* has done in the above illustration is to increase its sales in one market "on the sheer strength of its buying power in other markets" (R. 66). This device is similar in anticompetitive effect to a tying arrangement, which also produces a sale not because the supplier "has a better product or a lower price but because of his power or leverage in another market." *Northern Pac. R. Co.* v. *United States,* 356 U.S. 1, 6. A supplier who promises his customers to make reciprocal purchases or who threatens that he will purchase only from his buyers is, in effect, "tying" a sale to each purchase he makes. Competing sellers are placed at the same disadvantage as are sellers of a "tied" product; they are "shut out of the market by a provision that limits it, not in terms of quality, but in terms of a particular vendor." *International Salt Co.* v. *United States,* 332 U.S. 392, 398. In the above illustrations, Companies *C* and *D* are unable to compete with *A* not because they are inefficient or because their product is inferior, but simply because they are vendors only and are not, at the

same time, customers for the products sold by Company *B*. The effect of reciprocal buying is, therefore, to foreclose a supplier-customer's competitors from equal access to the market by providing an inducement to purchasers which is irrelevant to the merit of the product being sold and which cannot be matched by the competitors.

It is also highly significant that reciprocal buying is a technique particularly suited for large diversified firms.[9] As one study has observed, "The large diversified firm has better opportunities for using reciprocal buying than the single-line producer * * *. A firm that makes many products can more readily find a supplier that is also a potential buyer of what it makes * * *. Diversification not only increases the number of opportunities for reciprocal buying; it increases their magnitude. A single-line producer, even though a near-monopolist, may buy so little of some material that reciprocal buying has little influence on suppliers as potential customers. But by diversifying—making other products requiring the same input—a firm may so enlarge its buying as to give it the power to increase its sales." Stocking and Mueller, *Business Reciprocity and the Size of Firms,* 30 J. Bus. U. Chi. 73, 76–77.[9] For the same reason the opportunities offered by the pressures of reciprocity are an in-

[9] For other references to the importance of size and diversification in effectuating reciprocal dealing, see *id.* at 94–95; Ammer, *Realistic Reciprocity*, 40 Harv. Bus. Rev. (Jan.–Feb. 1962), pp. 116–117; Edwards, *Conglomerate Bigness as a Source of Power*, in Nat'l Bureau of Economic Research, Business Concentration and Price Policy (1955), pp. 342–345.

centive for mergers that concentrate economic power without increasing economic efficiency.

Finally, it should be noted that purchasing reciprocity has become, in recent years, a widespread practice. Many large concerns with substantial buying power have not only occasionally utilized reciprocal buying arrangements but have developed systematic reciprocity programs. See, *e.g.*, Ammer, *Realistic Reciprocity,* 40 Harv. Bus. Rev. (Jan.–Feb. 1962), p. 116; Handler, *Emerging Antitrust Issues: Reciprocity, Diversification and Joint Ventures,* 49 Va. L. Rev. 433; Hausman, *Reciprocal Dealing and the Antitrust Laws,* 77 Harv. L. Rev. 873; Donnem, *Conglomerate Mergers and Reciprocity,* 8 Antitrust Bull. 283; Stocking and Mueller, *Business Reciprocity and the Size of Firms,* 30 J. Bus. U. Chi. 73. The effect of such programs, if successful, would be to increase the size of the already large multi-product firms which are able to engage in reciprocal buying at the expense of the competing small businesses which are unable to offer the same inducements to prospective purchasers.[10]

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[10] Recently, executives charged with handling reciprocity for their corporations formed an organization called the Trade Relations Association, which as of the end of 1963 had 113 members. See Wall Street Journal, Dec. 4, 1963, p. 1. In a 1961 survey of representative manufacturers, 51 percent of responding purchasing agents and 49 percent of the sales managers stated that reciprocity was a factor in their firms' sales; in certain industries, *e.g.*, chemicals, steel, petroleum, all respondents agreed that reciprocity was a factor. Ammer, *supra*, at p. 116.

B. RECIPROCAL BUYING IS EQUALLY ANTICOMPETITIVE WHEN IT RESULTS FROM TACIT ACCOMMODATION RATHER THAN EXPRESS ARRANGEMENT

While reciprocal buying may be induced by an explicit threat or may be established by formal agreement, it is equally common for such reciprocity to depend on no express arrangement whatever. In many instances, reciprocal buying is caused by the "predilection of businessmen for an easy sale and the propensity to show gratitude to those who have favored a seller with orders." Handler, *Emerging Antitrust Issues: Reciprocity, Diversification and Joint Ventures,* 49 Va. L. Rev. 433, 435. Commentators who have studied business reciprocity have uniformly observed that it significantly affects purchasing decisions even in the absence of any overt coercion, and even, at times, without any explicit reference by either party to the anticipated advantages of reciprocal purchases. Ammer, *supra,* at p. 121; Hausman, *supra* at 875, 877; Stocking and Mueller, *supra,* at 91–92; Mandell, *Reciprocity: Industry's Secret Sales Weapon,* Dun's Review & Modern Industry (Sept. 1960) p. 32. In this form—characterized by the Commission as "the unspoken 'If I buy from him, he will buy from me'" (R. 56)—it may have its origin entirely in the unilateral decision of one of the parties. Thus, Company *B* may be influenced to purchase a product sold by Company *A* by its desire to retain or obtain Company *A* as a customer for its own products. But *B*'s decision to purchase *A*'s product rather than *C*'s or *D*'s will have been based not on the superior

quality of that product or on its price, but on the fact that *A* is a customer as well as a supplier, and that *A*'s patronage is worth having even at the expense of purchasing an inferior or more expensive product.

We submit that the threat to free competition presented by a market structure which occasions such a decision is as great as the threat presented when Company *A* prompts such a decision by hints, threats or promises. In either event the effect is to foreclose *C* and *D*, which are not, at one and the same time suppliers and customers, from competing on equal terms for the trade of *B*. In both instances the same "irrelevant and alien factor"—*i.e.*, the buying power of *A*—is cast into the purchasing decision to tip the balance struck by the legitimate competitive considerations of price, quality and service.

It certainly makes very little practical difference to *C* and *D* whether *B*'s reciprocal buying is the result of explicit coercion or of tacit accommodation. If there has been no explicit promise, *B* is, of course, less certain that *A* will reciprocate than if they had entered into a formal agreement. But the incentive for *B* to continue to deal with *A* rather than with *C* and *D*—for reasons having nothing to do with the merit of their products—still exists. Similarly, *E* and *F*, who sell the same product as *B* and also seek *A*'s patronage, are now competing with a customer of their potential customer. If they are in a position to buy *A*'s product, they will have every incentive to do so in order to set themselves on a par with their com-

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petitor; if they are not possible customers for any product sold by *A*, they are at an obvious competitive disadvantage because of the general "predilection * * * to show gratitude to those who have favored a seller with orders." See p. 20, *supra*.

The necessary consequence of a market structure lending itself to reciprocal buying by tacit accommodation is an ever-increasing trend to concentration. Single-line competitors such as *C* and *D* would be forced to consolidate with firms who could reciprocate for purchases made from them, and such firms would in turn, acquire single-line suppliers in order to take full advantage of their own buying power. At its most extreme, this trend could produce a market in which competition would be waged not with reference to the merit of the products being offered but by pitting one multi-product firm's buying power against that of its competitors.

Conversely, the social utility of reciprocal buying is negligible. Other than in highly extraordinary cases—where it may be used, for example, to rescue a failing business—it can serve no beneficial function. As is true of tying arrangements, reciprocal buying—whether by express arrangement or tacit accommodation—can "serve hardly any purpose beyond the suppression of competition." *Standard Oil Co.* v. *United State,* 337 U.S. 293, 305–306. And, whether done overtly or secretly, its destructive effect on competition is equally pernicious.

C. THE MOST EFFECTIVE MEANS OF PREVENTING ACCOMMODATIVE RECIPROCAL BUYING IS BY RESTRAINING MERGERS WHICH CHANGE THE MARKET STRUCTURE AND MAKE SUCH BUYING PROBABLE

As we have demonstrated, accommodative reciprocal buying often originates with a unilateral decision by one supplier-customer, and it develops into a tacit agreement between the parties involved. The incentive for such reciprocal dealing grows out of the market structure—*i.e.*, out of the circumstance that companies find themselves in the mutual relationship of seller and purchaser. It is the market structure which provides the opportunity to engage in such reciprocal buying, and the threat to competition which the possibility of reciprocal buying presents can most effectively be countered by correcting the market structure.

It is, of course, true that formalized reciprocal buying arrangements or reciprocal buying programs dependent on explicit promises or threats may be remedied by injunctions or cease-and-desist orders. This method was used to deal with the coercive tactics involved in three Federal Trade Commission cases in which such practices were attacked under Section 5 of the Federal Trade Commission Act. See note 7, *supra*. In such instances, as in the case of tying arrangements, what is being prevented is a particular coercive course of conduct in which unwilling customers are being compelled to deal with a supplier because of the supplier's leverage in some other market. That conduct may be prevented by an order enjoining it, as may a formal agreement for reciprocal buying.

Accommodative reciprocal buying, however, like, in a different context, "conscious parallelism" of pricing by competing sellers, cannot be dealt with in the same manner. No injunction can prevent Company *B* from deciding that it would be in that company's best interests to favor the products of Company *A*, which may thereby become *B*'s customer; and no cease-and-desist order can effectively enjoin Company *A* from then placing an order with Company *B* because of the "predilection * * * to show gratitude to those who have favored [*A*] with orders." See p. 20, *supra*. The basic evil in accommodative reciprocal buying is not the conduct of the parties—each of whom may be acting unilaterally without any intention of suppressing competition—but the market structure which provides the temptation to each company individually and which, in and of itself, places competing non-customer companies at a disadvantage.[11]

The only effective means of meeting the threat of reciprocal dealing is with a structural remedy such

[11] Difficulties of proof aside, there may be some doubt whether either Section 1 of the Sherman Act or Section 5 of the Federal Trade Commission Act could be applied to a tacit course of reciprocal buying in which no overt suggestion was made by either party. A commentator has recently observed that "[e]ven with a per se rule, section 1 of the Sherman Act will provide the market scant protection against reciprocal dealing. Unilateral practices are by definition not covered; and whether a mutual course of reciprocal dealing without an explicit agreement is consensual is, as in other areas, a hopeless conundrum." Hausman, *Reciprocal Dealing and the Antitrust Laws*, 77 Harv. L. Rev. 873, 884. With respect to the Federal Trade Commission Act, the same author stated, "It is doubtful that section 5 can reach unilateral practices in which no threat or suggestion is communicated and, often, none is intended." *Id.* at 885.

as that provided by Section 7 of the Clayton Act. Section 7 prohibits mergers whose effect "may be substantially to lessen competition." If a merger changes the structure of an industry in such a manner as to have the probability of increasing substantially the volume of reciprocal buying or enhancing the opportunities for such reciprocity, it obviously has the required anticompetitive effect. To preserve competition, it is essential to prevent any merger which creates such a market environment or to undo its consequences by means of a divestiture decree.

Such an application of Section 7 is consistent with its scope and purpose. As this Court observed in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 317, it was Congress' intent in enacting Section 7 to provide a statutory basis "for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency." Since Congress' concern "was with probabilities, not certainties" (*id.* at 323), the validity under Section 7 of any particular merger must turn on a functional view of the merger "in the context of the particular market involved, its structure, history and probable future." *United States* v. *Continental Can Co.,* 378 U.S. 441, 458. And in evaluating the "probable future" of the relevant market an important consideration is "not only existing competition but that which is sufficiently probable and imminent." *Ibid.* The prohibition under Section 7 of a conglomerate merger which significantly increases the likelihood of reciprocal dealing accords with these legislative policies. For, as we have shown, the "incipiency" of accommodative reciprocal

buying, which significantly lessens competition, is the challenged merger itself; the probable future of competition within the relevant market is significantly affected by the merger alone and may depend on no subsequent overt act; and the inhibiting effect the merger has, in and of itself, on "probable and imminent" competition—*i.e.*, on the competition which would have existed but for the merger—is apparent.

Moreover, reciprocal buying is a problem essentially attributable to the increasing trend towards business conglomeration. The firm which spreads itself over many product markets is in the best position to utilize reciprocity fully, while the small business is seldom able to take advantage of such an arrangement (see p. 18, *supra*). And while a business which expands internally into a new product area may find it necessary to make overt suggestions to its suppliers in order to prompt them to buy its new product, a firm which expands by merger with a concern which already serves many of its suppliers may rely on the suppliers' business sense as insurance that such patronage will be retained. Hence the danger of accommodative reciprocal buying, which cannot be effectively prevented by any other statutory remedy, is greatest in the case of expansion by merger. Finally, since reciprocity rewards size and diversification *per se*, without regard to efficiency or economies of scale, it tends to lead to further bigness and diversification.[12] Consequently, a single merger "endanger[s]

[12] Stocking and Mueller, *Business Reciprocity and the Size of Firms*, 30 J. Bus. U. Chi. at 75–78, 94–95; Ammer, *Realistic Reciprocity*, 40 Harv. Bus. Rev. (Jan.–Feb. 1962), pp. 116–117; Edwards, *Conglomerate Bigness as a Source of Power*, Nat'l

a much broader anticompetitive effect by triggering other mergers by companies seeking the same competitive advantages." *United States* v. *Continental Can Co.*, 378 U.S. 441, 464. As reported by the commission's Report on the Merger Movement (1948) which played an important role in the deliberations leading to the amendment of Section 7: "[T]here are few greater dangers to small business than the continued growth of the conglomerate corporation." *Id.* at 59.

The relevancy of the likelihood of reciprocal dealing to the legality of a merger under Section 7 was recently demonstrated by the Third Circuit's approval of a district court's finding that a proposed merger would introduce reciprocal buying pressures into the market. In *United States* v. *Ingersoll-Rand Co.*, 320 F. 2d 509, 524, the following observation by the trial court was expressly adopted by the court of appeals in its opinion affirming the entry of a preliminary injunction:

> It is not overly speculative to assume that the judicial use of its steel-purchasing power by Ingersoll-Rand could immeasurably increase the sales by the acquired companies of machinery and equipment to the coal mining companies which acutely need the continued good will of the steel industry. Moreover, the mere existence of this purchasing power might make its conscious employment toward this end unnecessary; the possession of the power is frequently sufficient, as sophisticated businessmen are quick to see the advantages in securing the good will of the possessor. Certainly the steel

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Bureau of Economic Research, *Business Concentration and Price Policy* (1955), pp. 342–345.

> producer who seeks orders from Ingersoll-Rand may tend to prefer the acquired companies as the source of supply of equipment used in his 'captive' mines, and the advantages accruing to him from so favoring the acquired companies would not have to be pointed out by Ingersoll-Rand. What may here be involved is the trade practice known as "Reciprocity". This is particularly destructive of competition because it transforms substantial buying power into a weapon for "denying competitors less favorably situated access to the market." *United States* v. *Griffith*, 334 U.S. 100, 108, 68 S. Ct. 941, 92 L. Ed. 1236 (1949).

Although we do not, at the present time, propose any single hard-and-fast formula which could be applied to determine, in every instance, whether a merger will have the necessary prohibited reciprocity effect, we submit that three factors are of major significance in passing on the lawfulness of a merger of this sort. First, the most important consideration is what proportion of the prospective purchasers in the relevant market—*i.e.*, those for whose patronage the acquired company and its competitors compete—are also suppliers of the acquiring company. This, together with the acquiring company's buying power, determines the effectiveness of the "leverage" which the combined company can apply to induce reciprocal buying. A subsidiary but related factor in estimating the effect which the merger will have on accommodative reciprocal buying is whether, and to what extent, the acquired company is already selling to firms which, in turn, supply the acquiring company. If this figure

is significantly large, it demonstrates that the combination will, *ipso facto,* place a substantial portion of the purchasers in the market in a position where they would be required to take some affirmative step to sever a buying relationship with their own customers.

Second, the nature of the competition within the market is highly relevant in determining whether competitors of the merged company will be foreclosed. If, for example, nearly all the merged company's competitors are already affiliated with concerns which buy from the customers in the market, a merger may, under certain circumstances, merely offset their unfair advantage. If, on the other hand, other suppliers in the market are unable to reciprocate for purchases by their customers, the merger may effectively foreclose competitors or trigger other similar combinations. Similarly, if the market is an oligopolistic one, the reciprocity effect of the merger, by discouraging new entrants, may further impair the competitive vigor of the market.

Third, industry practices are relevant in determining whether buying reciprocity can reasonably be expected to result from the merger. If competition in the industry is waged by means which would preclude reciprocal buying—as, for example, might be true in an industry where purchases are ordinarily made at auction and the identity of the seller is unknown—reciprocity could not be expected to occur.

These factors must be considered in light of the overall test which can only be stated in terms no more

general than the statute itself: Is it probable that the merger will significantly enhance the opportunities for reciprocity and produce substantial market foreclosure through express or accommodative reciprocal buying?

II

THE COMMISSION CORRECTLY FOUND THAT THE CONSOLIDATED-GENTRY MERGER VIOLATED SECTION 7

On the facts of this case the Commission determined that the Consolidated-Gentry merger violated Section 7 because it gave Consolidated "the power to extort or simply attract reciprocal purchases from suppliers" who would engage in such reciprocity "merely as a result of [Gentry's] connection with Consolidated, and without any action on its part" (R. 66–67). This conclusion was based upon findings that Consolidated purchases the products of a substantial number of food processors who are, in turn, buyers of dehydrated onion and garlic (R. 56, 69–70); that the structure of the dehydrated onion and garlic market is conducive to reciprocal dealing (R. 56, 66, 69); that there are no "solid and effective external limitations" on Consolidated's power to foreclose competition in this manner but that "the industry structure seems tailor-made to the exploitation of reciprocal buying power" (R. 71); and that there is "no reason to believe that industry conditions preclude" the effective lessening of competition by means of reciprocal buying (R. 71). The Commission also relied, to some degree, on proof of "actual use of rec-

iprocity by Consolidated in pushing Gentry's products" R. 70).

Since the Commission based its finding of illegality on the change in market structure wrought by the merger and the probable consequences thereof, it did not pass on the correctness of the hearing examiner's findings that in seven specific instances, five of which respondent had disputed on the facts, purchases from Gentry had been induced by Consolidated's "express or implied business coercion" (R. 37, 38–47). In its opinion, the Commission shifted the focus from specific post-merger abuses to the probable anticompetitive consequences of the change in market structure attributable to the challenged merger. We submit that the Commission's findings and ultimate determination are fully supported by the record, and that the Commission's approach in relegating post-merger evidence to a subsidiary role was proper.

A. THE CHANGED MARKET STRUCTURE CAUSED BY THE MERGER IS LIKELY TO PRODUCE RECIPROCAL BUYING AND MARKET FORECLOSURE

1. The post-merger market structure is conducive to reciprocal buying

Consolidated's acquisition of Gentry brought about a change in market structure which established the basic prerequisite for reciprocal dealing: Consolidated became the supplier or prospective supplier of dehydrated onion and garlic to food processors from which it was also a purchaser. There is no question but that the merger presented Consolidated with the opportunity "previously unavailable" (R. 66) to en-

gage in reciprocal buying on Gentry's behalf.[13] Consolidated's purchases from food processors are obviously substantial enough to induce or compel reciprocal dealing; in its capacity as a wholesaler and retailer of food products, Consolidated bought in 1955 more than $134 million worth of processed food (R. 1974). The evidence also demonstrates that Consolidated is a significant customer, or potential customer, of most food processors (see, *e.g.*, R. 1072, 1076–1077, 1392, 1607, 1610, 1817, 1819).

The Commission found that "approximately one-fourth of the available market stands to be influenced by the possibility that Consolidated will withdraw patronage unless Gentry is in turn patronized," and that "many other prospective purchasers from Gentry could be influenced by the expectation or promise of reciprocal purchases of their products by Consolidated" (R. 70). The above finding was predicated on data taken from respondent's proposed findings of fact and conclusions of law (see R. 69). The data show that, in 1958, suppliers of Consolidated who were also "major" customers of Gentry (*i.e.*, those customers which purchased more than 10,000 pounds of onion and garlic from Gentry in any year) bought *from Gentry* approximately 25 percent of the total industry sales of onion and garlic (see

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[13] Consolidated's expert witness admitted as much on direct examination (R. 1886):

> Q. Dr. Mehren, how would you evaluate the economic effect of a conglomerate merger where customers of the acquired company are suppliers to the acquiring company?
>
> A. Well, obviously this provides a possibility for reciprocity. * * *

Appendices A, B and C, pp. 54–56, *infra*). This is obviously the irreducible minimum share of the market to be affected by the merger; it is, indeed, that portion of the market subject to reciprocity which has already been captured by Gentry and which will remain with Consolidated if accommodative reciprocal buying continues. When the sales of the other vendors in the industry (Basic and Puccinelli) to Consolidated's suppliers are added to the Gentry sales, the combined sales to such suppliers, in 1958, account for around 50 percent of total domestic sales of dehydrated onion and garlic to all consumers.[14] In other words, the market for dehydrated onion and garlic is about evenly divided between suppliers of Consolidated and others, some of whom are *potential* suppliers of Consolidated.

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[14] The following chart is a comparison of 1958 domestic sales of dehydrated onion and garlic (in pounds) to Consolidated's suppliers with total domestic 1958 sales to all purchasers of the products:

	Onion	Garlic	Both
Total industry sales	18,147,204	5,127,042	23,274,249
Sales to Consolidated's suppliers:			
Gentry	[1] 4,617,145	[1] 1,263,690	[1] 5,880,835
Basic and Puccinelli	[2] 4,500,000	[2] 1,400,000	[2] 5,900,000
Total	9,117,145	2,553,690	11,780,835
Percent of sales to Consolidated's suppliers	50.24	51.95	50.61

[1] These are Gentry's sales to customers who purchased 10,000 pounds or more in any one year between 1946–1958, see Appendices A and B, pp. 54–55, *infra*.

[2] These approximate sales figures for Basic and Puccinelli were drawn from the testimony of witnesses who were suppliers of Consolidated and who purchased onion or garlic or both from Basic, Puccinelli or Gentry. The sales data covering Basic and Puccinelli have sometimes been estimated and are derived from the following record sources: R. 787, 818, 864, 954, 1168, 1366, 1629, 1825; RX 123–127, 129, 131–133, 135, 137–138, 141–143, 145–149, 152–153, 158–159, 162, 172–173, 180–181, 196, 198–201, 372–374, 380–381, 384–385, 393, 400, 403–406, 408–410, 414–416, 419, R. 2438–2447, 2449–2450, 2453–2459, 2462–2465, 2468, 2478–2479, 2485–2486, 2503, 2506–2508, 2638–2642, 2646–2647, 2661, 2667, 2674–2682, 2684.

Another aspect of market structure which makes reciprocal dealing likely in this case, as the Commission noted, is the pattern of competition in the dehydrated onion and garlic field. Consolidated's competitors in dehydrated onion and garlic are relatively small and undiversified (R. 66). They are unable to exert reciprocal pressures or to arrange reciprocal accommodations. Hence, food processors are not likely to resist the inducement of selling to Consolidated because of countervailing threats from Gentry's competitors and may themselves initiate reciprocal arrangements to gain Consolidated's custom. And the likely effectiveness of reciprocity as well as the substantial portion of the dehydrated onion and garlic market which is susceptible to the lures of reciprocal buying (p. 32–33, *supra*) give Consolidated the strongest temptation to use the opportunity to enhance its position in the onion and garlic market by reciprocating for orders placed with it.

It is also highly significant that the dehydrated onion and garlic market is a market in which "maximum concentration short of monopoly has already been achieved" (R. 72).[15] The presence of a large company with power to preempt a substantial share of the total market by means of reciprocal buying will tend to discourage the entry of new competitors and will encourage Consolidated's present small single-line competitors to sell out to large diversified companies

[15] See p. 4, *supra*.

which would be in a position to compete on equal terms. One commentator has noted that where reciprocal buying occurs, "[e]ntry by firms not established elsewhere is discouraged, for whatever confidence an entrepreneur may have in the quality of his proposed article or the efficiency of his scheme of production and marketing, his resolve to enter will weaken when confronted with the knowledge that established firms have buyers tied in by reciprocal dealing." Hausman. *Reciprocal Dealing and the Antitrust Laws*, 77 Harv. L. Rev. 873, 879–880. In this connection, we note that the only potential entrant as of the date of the hearing was a subsidiary of General Foods Corporation, whose annual sales of a variety of food products exceed one billion dollars (R. 2690). A prior entrant, Gilroy Foods, Inc., had been acquired by a large firm, McCormick & Co., whose requirements exceed Gilroy's entire output (R. 73 n. 9). This is particularly significant in light of the fact that the output of the industry doubled between 1950 and 1958—a circumstance which would ordinarily be an inducement for new entries.

2. Reciprocal buying is a useful weapon to increase sales in the industry

Testimony and other evidence presented to the Commission also established that reciprocity is as much a part of the dehydrated onion and garlic business as of most other industries. Consolidated's president testified as follows (R. 123–124):

> Q. Now does your company have a policy of reciprocity?

A. We see nothing wrong in soliciting business in the normal way, and we think that a customer that buys from us would, everything being equal, at least give us a hearing * * *.

Q. When you say "give us a hearing" you mean buy dried food seasoning from your Gentry division?

A. No, consider the product—the quality—the price, and the service.

Q. And ultimately buy it?

A. Not necessarily, we hope so.

Q. That is the purpose?

A. We hope so, but we have no assurance.

Q. You have no assurance that he would buy, but that is the doctrine of reciprocity that is referred to, is that correct?

A. That is right. I think that is generally accepted in business.

And when asked whether Consolidated had attempted to arrange reciprocal buying before its merger with Gentry, he replied (R. 147, emphasis added):

> I don't know of any similar arrangements before. I think it goes on in business every day. If you are doing business with a certain firm and you have some products to sell, without pressure, *without even suggesting,* often times it leads to a closer relationship between buyer and seller.

Consolidated's secretary illustrated this point in a memorandum to its distributing divisions in which he said, "Oftentimes, it is a great advantage to know when you are calling on a prospect, whether or not that prospect is a supplier of someone within your own

organization. Everyone believes in reciprocity providing all things are equal" (CX 14B, R. 2007).

Evidence was also introduced to establish that food processors—the buyers for whose trade Gentry and its competitors were vying—believed that reciprocity would work in the dehydrated onion and garlic industry. Many food processors who sold to Consolidated candidly stated that they would give their onion and garlic business to Gentry for reciprocity reasons if it could meet the price and quality of its competitors' products. Thus, American Home Foods, Inc., intended to "give every consideration to placing some business with [Gentry], providing, of course, that all things are equal in respect to quality, price and service" (RX 136, R. 2448). F. M. Wilson Company stated that "if other things were equal [its] onion and garlic business should go to Gentry because Consolidated Food Corp. was [its] good customer" (RX 100, R. 2414). The ability of Basic to sell to this firm depended on its being "a little lower than Gentry in price * * *" or on Gentry's products being rejected as "not satisfactory" (*ibid.*). J. L. Read Foods, Inc. said that the Consolidated-Gentry relationship "meant nothing to [it] if the product offered didn't come up to standards. If it did on the other hand, [Read] felt that Gentry should be given consideration" (RX 77 A–C, R. 2391). Or, as Oscar Mayer & Company put it, "if Gentry's material is equal in quality and price, they should be given preference. * * *," but Basic could obtain the business if it offered a "product * * * of better quality"

(RX 59, R. 2372). The attitude of the food processors was summed up in a letter written to Consolidated by the president of Armour & Company (RX 383A–B, R. 2645):

> I can assure you that it is the desire of our people to reciprocate and cooperate with you in any way we can in line with good business practices, and I am sure that if our quality obstacles can be overcome, your quotations will receive favorable consideration. We value our relationship with you very highly and are disappointed that we have been unable lately to reciprocate for your fine cooperation on Armour Pantry Shelf Meats.

The above evidence amply supports the Commission's conclusions "that merely as a result of its connection with Consolidated, and without any action on the latter's part, Gentry would have an unfair advantage over competitors enabling it to make sales that otherwise might not have been made" (R. 66–67; see also R. 56, 62); and that there are no "industry conditions" to limit the anticompetitive effects of reciprocity and no "solid and effective external limitations" upon Consolidated's power to use it (R. 71).

It is no answer to assert that the testimony and other evidence merely showed that Gentry would be given preference if all other factors (*i.e.*, price and quality) were equal. To be sure, price and quality standards are significant in the food industry, but this record demonstrates clearly that reciprocity tips the scale if price and quality are evenly balanced. This pinpoints the competitive disadvantage under

which Gentry's competitors are forced to labor because of the merger. In order to have an equal opportunity to make sales they must cut their prices, reducing their profit margins, or raise their quality with no price recognition for their superior product. If Gentry can equal their price or match their quality, they will be foreclosed. This is precisely the vice of reciprocity. As articulated by the Commission it "enable[s] one seller to succeed over another not on the basis of 'a better product or a lower price but because of his power or leverage in another market' * * * " (R. 63). And an obvious corollary of the fact that purchases will be made from Gentry if all things are equal is that a purchaser believes that it will be advantageous to purchase from Gentry. Consequently, it necessarily follows that there is a point at which that benefit could compensate for some inferiority of Gentry's product.

An analogy is presented by this Court's tying decisions which establish that an illegal foreclosure results when market leverage prevents competitors from selling their product or service on equal terms, even though they are not barred from making sales on better terms. In *International Salt Co.* v. *United States,* 332 U.S. 392, this Court rejected the argument that a tying arrangement was lawful because it provided that "if any competitor offered salt of equal grade at a lower price" that salt could be purchased. The Court stated (332 U.S. at 396–397):

> The appellant had at all times a priority on the business at equal prices. A competitor

> would have to undercut appellant's price to have any hope of capturing the market, while appellant could hold that market by merely meeting competition. We do not think this concession relieves the contract of being a restraint of trade, albeit a less harsh one than would result in the absence of such a provision. * * *

See also *Northern Pac. R. Co.* v. *United States,* 356 U.S. 1, 3, 6, 12, in which a railroad's lessees were permitted to use a competing carrier if its rates were lower or in some instances if its service was better than the defendants. This arrangement was held to be illegal because it denied the railroad's competitors "access to the fenced-off market on the same terms as the defendant."

3. *Consolidated had success in some overt efforts to capitalize on its advantageous post-merger position*

Post-acquisition evidence was used by the Commission to confirm its findings respecting the probable consequences of the merger. Finding that Consolidated's coercive tactics would have warranted a cease-and-desist order under Section 5 of the Federal Trade Commission Act (R. 63), the Commission relied on proof that such tactics had occasionally been successful to buttress its conclusion that the dehydrated onion and garlic market was susceptible to reciprocity pressures. Respondent itself described one such incident as follows (R.S. 81):[16]

> * * * When Woolson [Spice Company] received the contract for packing Consolidated's

[16] Petitioner's Analysis of Reciprocity Evidence by Companies—The Reciprocity Supplement, filed in the court of appeals, is cited as "R.S."

> private label spices in 1956 * * * [its purchasing agent] felt it only fair that Gentry's products should be used as ingredients if possible. * * * However, at the request of certain customers, Woolson continued to purchase some items from Basic.

Woolson's president testified (R. 1404, 1406):

> * * * I am sure that the fact that we were selling spices or packing spices for Consolidated made us favor them more, give them more business than we might otherwise have given them. But a lot of it was due to their sales aggressiveness.
>
> * * * * *
>
> I personally feel and I believe our company feels * * * that it is just good sound business to buy from a customer whenever possible * * * I wouldn't pay a customer a premium; their quality and their price has to be competitive, but all things being equal, then I would prefer to give the business to a customer.

Consolidated has admitted that another food processor which succumbed to the reciprocity lure was the Illinois Meat Company (Br. in Opp. 30). Illinois Meat's vice-president testified that after a call from a Consolidated executive, "a salesman from Gentry called on us and the price seemed satisfactory, and the merchandise looked O.K., and we did do some business with them" (R. 1818). He explained that he bought from Gentry because the executive was a personal friend, and "Consolidated was a nice customer of ours, and if things could have worked out that we could do something for a customer, fine" (R. 1819). After sev-

eral years, however, Illinois Meat transferred its business to Simplot because "[t]heir price was cheaper and their quality looked as good, or perhaps better than what we were buying * * *" (R. 1819). When Simplot went out of busin[illegible], Puccinelli won the account "on the basis of price or quality" (R. 1820).

Finally, in one admitted instance, reciprocity coerced purchases from Gentry regardless of a competitor's better price or quality. Consolidated has conceded that J. J. Gielow & Sons, Inc., "gave all its onion and garlic business to Gentry after 1954 because of a reciprocity contract * * *" (R.S. 32). In 1953, when Consolidated was Gielow's second largest customer (R. 1607), a Basic salesman reported that Consolidated "is still bearing down hard on Gielow's sales manager to buy Gentry material. To date the implication has been only that we buy a lot of your pickles, why don't you buy some of our garlic?" (RX 197, R. 2504). Basic's salesman testified that, despite Consolidated's suggestions, he had been able to continue to sell to Gielow during 1953, largely by appealing to his pride as an independent businessman (R. 1383). But by 1954, the same salesman reported to Basic that the "reciprocity situation was stated clearly to L. J. Gielow by [Consolidated executives] before they would agree to contract for private label packs" (CX 163A–B, R. 2223). The salesman's memorandum further pointed out that "even if [Basic] were several cents lower, it wouldn't change the reciprocity situation" (R. 2224). At that time, the Basic salesman believed, "no matter how much

I talked about quality or price or delivery, I wasn't able to bring about any change * * *" (R. 1384).[17] That his belief was probably correct is confirmed by the fact that Basic's sales to Gielow stopped completely after 1953, although it had previously sold much more to that account than had Gentry (RX 380, R. 2641).

4. *The record provides no reason to believe that Consolidated lacked the power to foreclose competition*

All this evidence more than adequately supports the Commission's conclusion that the challenged merger "conferred upon [Consolidated] the power to foreclose competition from a substantial share of the markets for dehydrated onion and garlic * * *" (R. 75). Since, as the Commission observed, "Section 7 reads 'may be' not 'has'" (R. 71), attention must be focussed in a merger case not on whether the anti-competitive power is exercised, but on whether the power exists. Antitrust law in the merger field has traditionally been concerned with the accretion of power, not with the permissibility of its exercise. Hence even if it were true that Consolidated did not exercise the power to obtain reciprocal purchases,

[17] Gielow's sales manager testified that he would not have purchased from Gentry if its price had been higher than Basic's (R. 1603). But he did not deny that the statements quoted in the text were made; in fact, he acknowledged that they had been made. On that point, he explained (R. 1603): "Well, Mr. Gielow had been buying from Basic for quite a while and wanted to soften the blow, so [the salesman] would have an answer to his organization." But this explanation does not suggest any legitimate motive for the Gielow statement, which would obviously have suggested to Basic that it would be futile to compete for sales to Gielow on any terms.

this fact would be irrelevant. Actually, however, the record supports the Commission's finding that Consolidated suffered from "internal irresolution in implementing reciprocity" (R. 71), and that it did not voluntarily choose to abandon or disavow such tactics.

In May 1955 a Gentry executive wrote to a Consolidated vice-president, complaining that "a good part" of their reciprocity efforts had been "nonproductive" (CX 226A–F, R. 2310). He suggested that Consolidated should "take the attitude that if a firm wishes to sell us merchandise, they in turn can buy our raw materials"; and that Consolidated should be "prepared to follow and discontinue suppliers that can't seem to see the matter our way" (*ibid.*). The vice-president referred the matter to Consolidated's director of purchases, who replied that while the idea was "a good one [as] we have demonstrated by working very closely with Mr. Kraham in certain particular instances", it should not "be made a matter of company policy" (RX 421, R. 2685). His view was that "each situation has to be met individually * * *" and that Consolidated "would be better off in the long run to try to win them [its suppliers] over on a friendly basis than to 'hit them over the head'" (R. 2685, 2686). In September 1955, Consolidated's secretary informed the Gentry executive that his idea had been rejected. The secretary's view was that he did not want to bind Consolidated to purchase from Gentry's customers because, while "it would not be unlawful * * * we could probably tie ourselves up into such a situation that

it might involve unfair competition" (RX 151A–B, R. 2461). He pointed out, however, that he did not see "anything to fear in discussing or asking for reciprocity from suppliers * * *" and that "[e]verything being equal, we, of course, would like to purchase from people that use your products, but price and quality are not always equal * * *" (*ibid.*).

Nor is there any merit to the suggestion in the opinion of the court of appeals that Consolidated did not have the power to induce reciprocal buying because nationally advertised products are "relatively immune" from pressures by individual wholesalers or retailers (R. 2691, 2693). In the first place, even if this assertion were true, it would not affect the availability of reciprocity pressures vis-à-vis a large part of Consolidated's suppliers, which do not sell nationally known brands. Indeed, the most vulnerable suppliers are those who process food for Consolidated's private-label brands, since such purchases may obviously be discontinued at will (see R. 447). More significantly, however, the record demonstrates that Consolidated does have the power selectively to discontinue orders even for nationally advertised brand-name products. An employee of the Piggly Wiggly Midwest Company, a subsidiary of Consolidated, testified that local consumer acceptance of nationally-advertised brands fluctuates; whether it is up or down depends, in part, on the intensity of the advertising in a particular area (R. 559). When consumer acceptance for one brand is "[l]ess than

[for] other national brands," the former can be discontinued, as had been done to Hunt Foods in his area (in favor of Del Monte) even though "we would move some [Hunt] product off shelf if we had it" (R. 558, 559). Similarly, a manager of the Monarch Division of Consolidated testified that he dropped Gerber products and took on Heinz instead, although Gerber had some consumer acceptance immediately before he discontinued it (R. 585). Consumer patterns are probably affected as well by the sales policies of large retail stores. Presumably, those patrons of Consolidated who were buying Hunt and Gerber products before they were discontinued thereafter purchased Del Monte and Heinz, the products carried in their stead. Consolidated, therefore, clearly has reciprocity leverage even over producers of nationally-advertised brands.

B. THE POST-ACQUISITION EVIDENCE FAILED TO ESTABLISH THAT RECIPROCAL BUYING COULD NOT BE ACHIEVED IN THE FOOD INDUSTRY

The court of appeals, relying on the evidence of "ten years of post-acquisition experience" (R. 2692), concluded that neither the merger itself nor Consolidated's overt attempts to induce reciprocal buying resulted in the "substantial anticompetitive effect" which had to be proved to establish that the merger violated Section 7. The court based this conclusion largely on the fact that Gentry's share of the dehydrated onion market increased by only 7 percent in the years following the merger and that its share of the dehydrated garlic market fell by approximately

12 percent (R. 2692–2693). Respondent has made a similar contention in this Court (Br. in Opp. 24–44). The Commission, on the other hand, did not rely on post-acquisition evidence for any purpose other than to confirm its view that the merger created a significant threat that the market structure would be used to induce anticompetitive reciprocal buying (R. 70). We submit that the Commission correctly limited the weight to be given to post-acquisition evidence and that the court of appeals erred in concluding that the Commission's expert projection of "a future possibility" was necessarily refuted by some evidence of "what the record demonstrates as to the past" (R. 2693).

The central issue in a Section 7 case is whether the effect of the merger "may be substantially to lessen competition." As this Court observed in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 362, a resolution of this issue "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future." The focus in a Section 7 proceeding is, therefore, not on what *has* happened but on what may happen; the emphasis must be on evidence of market structure rather than on evidence of market behavior. This is particularly true if there is to be any element of predictability to Section 7 judgments. If post-merger conduct were deemed of substantial probative value in determining the probable effect of the merger upon competition,

it would be most difficult to make a sound evaluation of the lawfulness of a merger before its consummation.

Moreover, in the ordinary case (even if not in this one), post-acquisition evidence, particularly if it amounts to a record of "good behavior," is largely self-serving. A company which knows that its merger is under attack may control anticipated anticompetitive conduct until after the evidence is introduced and a judgment is entered. Hence the reliability of such evidence as an indication of normal market conditions is highly questionable. See *United States* v. *Continental Can Co.*, 378 U.S. 441, 463.

In addition, as the Federal Trade Commission has observed in recent decisions,[18] liberal admissibility of post-acquisition evidence tends to delay the resolution of Section 7 cases, makes records unwieldy and ultimately frustrates the prophylactic purpose of Section 7. This is particularly true in Commission actions under Section 7, since it is unclear whether the Commission can obtain a temporary injunction to block the merger pending the administrative proceedings.

There are, of course, permissible areas for post-acquisition evidence. As that evidence was used here by the Commission, it buttressed generally the Commission's conclusion that the merger provided an opportunity for coerced or tacit reciprocal buying.

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[18] *Procter & Gamble Co.*, No. 6901 (November 26, 1963), pp. 38–39; *Ekco Products Co.*, No. 8122 (April 21, 1964), pp. 9–10.

Similarly, evidence establishing that reciprocal buying was, in fact, impossible in the relevant industry would be material and admissible. But this proof should not be made to turn on a recitation of individual post-acquisition failures. The probative value of the particular unsuccessful attempts is minimal since there is no ordinarily satisfactory method of determining the underlying cause of any single failure. In this case, the Commission properly did not pass on the particular instances when such attempts were allegedly successful or unsuccessful; the state of the record demonstrates that the proof was, at best, equivocal with respect to the success of those endeavors.

Nor is there any support in the post-merger market shares which were heavily relied upon by the court of appeals. In the first place, Gentry did not merely hold its own business, as the court of appeals' market share figures suggest. The volume of its sales of onion and garlic more than doubled after the merger during years in which the industry experienced rapid growth. In the context of increasing sales, a decline in Gentry's share of the garlic market is not convincing refutation of the evidence that reciprocity was effective.

Moreover, the record indicates that but for the merger and the resulting reciprocity, Gentry's market share may have significantly decreased. The Commission said, "We do not know that its [market] share would not have fallen still farther, had it not been for the influence of reciprocal buying" (R. 73

n. 10). Cf. *Standard Oil Company* v. *United States*, 337 U.S. 293, 299, 308–314. This possibility is supported by the fact that Gentry managed to more than double its volume and maintain its overall market position despite the generally recognized higher quality of Basic's products. The Commission found that "Basic * * * has been the innovator and leader in the field. Gentry has recently made technical strides narrowing, although probably not closing, the gap between them" (R. 72). This finding is supported not only by the testimony of users of dehydrated onion and garlic (*e.g.*, R. 753, 756, 820, 1249), but also by the testimony of Dr. Prater, the president of Gentry, who admitted Basic's superiority. He testified (R. 1444):

> Q. Overall, which company would you say has been the leader in the processing improvements and innovations in the last ten years.
>
> A. Well, again, I don't like this being on the record, but I would have to answer Basic.[19]

Dr. Prater also admitted that, as of the date of the hearing (February 1961), Gentry may have closed the gap somewhat (R. 1496–1497), but Basic's

[19] The witness later explained more specifically (R. 1495):

> Well, they had been the leader in research and development in raw material fields, and in crop development. They spent considerable sums of money and led in research and development of crop techniques, in harvesting techniques, loading equipment, bulk storage and bulk hauling, all of which tied into procurement. They put a very intensive effort behind garlic, and they put in specialists in the field, specialists in the growing and handling of garlic. They have been very active in this whole field, and they have done much more than anyone else in the industry has.

onions still had "a lower shrinkage, higher solids and better dehydration quality" (R. 1499). The picture in the garlic market was similar. Dr. Prater said that Basic was the leader, although Gentry had previously produced a superior dehydrated garlic. It had, however, "lost that position" because it did "not spen[d] the time, the money and the effort * * * to carry out the kind of research and development to keep improving the garlic as fast as competition, as Basic has done" (R. 1501; RX 207, R. 2518). And, as to both garlic and onion, Gentry's products often had too high a bacteria count to meet some user's specifications (R. 1500).

Yet, despite its product inferiority[20] and despite the fact that Basic has sold at the same price (*e.g.*, R. 760, 1081, 1087, 1249) or at a competitive price (see R. 872–873), Gentry has managed to maintain its market position. Indeed, to forestall Gentry from supplanting it as sales leader, Basic had to increase its sales aggressiveness. Basic's sales supervisor testified that after 1951 he (R. 303)—

> had to add men to our sales force and to give * * * more service to the customers, we have also had to do considerable work in developing

[20] The court of appeals stated that, after the merger, Gentry "improved its onion processing equipment to eliminate a problem arising from the presence of wood splinters and achieved a product of higher quality than that of its competitors * * *" (R. 2693). The court thus improperly rejected the Commission's finding, which is supported by the testimony of Dr. Prater. After Gentry improved the process, Basic also stopped using wooden dehydration equipment so that the processing method used by both eliminated the wood splinters (R. 1501; Br. in Opp. 41).

> of new products and new ideas to maintain our position in the field, because we seem to be losing business with old buyers.

Indeed, a close analysis of the post-acquisition figures demonstrates that reciprocity was very much at work in promoting Gentry's sales. In 1950, the last full year before the merger, Gentry made about 65 percent of its "major" sales (*i.e.*, 10,000 pounds or more a year) to food processors which supply Consolidated. In 1951, the figure dropped to about 55 percent. By 1958, however, after almost eight years of joint operation, the sales to Consolidated suppliers had increased to approximately 71 percent of major sales, at a time when such firms comprised about 50 percent of the total market for dehydrated onion and garlic (see note 14, *supra*.[21] Between 1950 and 1958, Gentry's total sales increased by 5,158,052 pounds, and its sales to Consolidated's suppliers increased by 3,867,180 pounds. More than 74 percent of its overall increase was, therefore, attributable to Consolidated suppliers. And between 1951 and 1958, Gentry's total sales increased by 3,656,139 pounds, and its sales in the protected market went up by 3,375,346 pounds. Hence about 92 percent of the increment was attributable to Consolidated's suppliers. While

[21] These figures understate the concentration of Gentry's sales to Consolidated suppliers, since the total sales figures include its sales to all customers, while sales to Consolidated suppliers are limited to major customers. The above figures and those following are taken from the chart in Appendix C, p. 56, *infra*. The proportionate figures for onion and garlic considered separately are set forth in the charts in Appendices A and B, pp. 54–55, *infra*.

the effects of reciprocity are often subtle and difficult to isolate, the post-acquisition evidence makes one point very clear: since the merger, with the improvement in quality of Gentry products, Gentry's sales have become progressively more concentrated among Consolidated's suppliers. It thus appears that even if substantial weight is accorded to the post-acquisition figures, they tend to support the Commission's conclusion that the effect of the merger was substantially to enhance the possibility that reciprocal buying would occur.

CONCLUSION

We respectfully submit that the judgment of the court of appeals should be reversed.

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APPENDIX A

Comparison of Gentry's sales of dehydrated onion to "major customers" which also were suppliers to Consolidated, *i.e.*, customers to which during the years 1946–1958 Gentry sold at least 10,000 pounds of onion and/or garlic in any one year, with total industry sales of dehydrated onion and total Gentry sales of dehydrated onion:

Year	Total industry sales of dehydrated onion (pounds)	Total Gentry sales of dehydrated onion (pounds)	Gentry's sales to major customers who were suppliers to Consolidated		
			Pounds	Percent of total Gentry sales	Percent of total industry sales
1950	7,802,189	2,158,880	1,396,859	64.7	17.9
1951	13,621,343	3,610,313	1,826,070	50.6	13.4
1952	11,849,689	3,253,113	1,614,777	49.6	13.6
1953	11,736,010	4,222,718	2,227,653	52.7	19.0
1954	10,845,721	3,135,354	1,811,516	57.8	16.7
1955	13,701,517	3,914,770	2,563,700	65.5	18.7
1956	14,612,629	4,840,238	3,101,394	64.1	21.2
1957	17,036,961	6,485,052	4,274,030	65.9	25.1
1958	18,147,207	6,259,171	4,617,145	73.8	25.4

APPENDIX B

Comparison of Gentry's sales of dehydrated garlic to "major customers" which also were suppliers to Consolidated, *i.e.*, customers to which during the years 1946–1958 Gentry sold at least 10,000 pounds of onion and/or garlic in any one year, with total industry sales of dehydrated garlic and total Gentry sales of dehydrated garlic:

Year	Total industry sales of dehydrated garlic (pounds)	Total Gentry sales of dehydrated garlic (pounds)	Gentry's sales to major customers who were suppliers to Consolidated		
			Pounds	Percent of total Gentry sales	Percent of total industry sales
1950	1,799,518	922,073	616,796	66.9	34.3
1951	2,027,906	972,553	679,419	69.9	33.5
1952	2,341,174	1,172,308	665,547	56.8	28.4
1953	2,641,114	1,252,876	763,703	61.0	28.9
1954	2,921,028	1,346,701	817,937	60.7	28.0
1955	3,877,186	1,668,176	1,115,630	65.7	28.8
1956	4,039,204	1,753,211	1,060,262	60.5	26.2
1957	4,516,871	2,103,000	1,306,108	62.1	28.9
1958	5,127,042	1,979,834	1,263,690	63.8	24.6

APPENDIX C

Comparison of Gentry's combined sales of dehydrated onion and garlic to "major customers" which also were suppliers to Consolidated, *i.e.*, customers to which during the years 1946–1958 Gentry sold at least 10,000 pounds of onion and/or garlic in any one year, with total industry sales of dehydrated onion and garlic and total Gentry sales of dehydrated onion and garlic:

Year	Total industry sales of dehydrated onion and garlic (pounds)	Total Gentry sales of dehydrated onion and garlic (pounds)	Gentry's sales to major customers who were suppliers to Consolidated		
			Pounds	Percent of total Gentry sales	Percent of total industry sales
1950	9,601,677	3,080,953	2,013,655	65.3	20.9
1951	15,649,249	4,882,866	2,506,489	54.6	16.0
1952	14,190,833	4,425,421	2,280,324	51.5	16.0
1953	14,377,124	5,475,894	2,990,756	54.6	20.8
1954	13,766,749	4,482,055	2,639,453	58.6	19.1
1955	17,578,703	5,812,946	3,679,330	65.5	20.9
1956	18,651,833	6,593,449	4,161,656	63.1	22.3
1957	21,553,832	8,568,052	5,880,138	64.9	25.8
1958	23,274,249	8,229,005	5,880,835	71.8	25.2

Note to Appendices A, B and C

The data with respect to total industry sales of onion and garlic, total Gentry sales, and Gentry's sales to "major customers" which also were Consolidated suppliers is taken from Consolidated's proposed findings of fact and conclusions of law before the hearing examiner, pp. 45–46, 99–101. That data, in turn, is derived from RX 170, 171, 191A–M, R. 2476–2477, 2489–2502; RX 411 and 412, unprinted.

APPENDIX D

The following are the places in the record where each exhibit we rely upon was received into evidence:

Commission exhibits:	Record page
1	93
6	167
7A–B	167
8A–B	172
9	174
10	175
11A–B	181
12A–B	191
13A–B	114
14A–C	1719
15 through 18	191
20A through 74B	191
75A through 84	191
86 through 88	191
89A–B	114
90 through 92	191
93 through 95	114
163A–B	370
226A–F	1019
Respondent's exhibits:	
59	668
77A–C	668
123	698
124	698
125	717
126	738
127	748
129	775
131	800
132	809

Respondent's exhibits—Continued	Record page
133	817
135	831
136	833
137	863
138	880
141	904
142	920
143	933
145	954
146	965
147	972
148	985
149	987
151A-B	1029
152	1039
153	1050
158	1065
159	1081
162	1145
170	1325
171	1325
172	1158
173	1167
180	1258
181	1266
191A-M	1324
196	1366
197	1382
198	1394
199	1400
200	1409
201	1415
207	1460
372	1506
373	1557
374	1585
380	1599
381	1612
382	1614
383A-B	1614

Respondent's exhibits—Continued	Record page
384	1635
385	1629
393	1642
395A-B	1666
400	1692
403	1747
404	1756
405	1767
406	1782
408	1807
409	1818
410	1823
411	1828
412	1828
414	1831
415	1840
416	1845
419	1872
421	1872

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